
U.S. Department of Labor
Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005

DATE: January 29, 1987
CASE No. 86-ERA-13

In the Matter of

CHARLES A. HENREY, III
Complainant

against

PULLMAN POWER PRODUCTS, CORP.
Respondent

Appearances

Fred Schuster, Esquire
Laurie Fowler, Esquire
For the Complainant
Richard R. Boisseau, Esquire
For the Respondent

BEFORE: PARLEN L. MCKENNA
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This is a proceeding pursuant to the Energy Reorganization Act of 1974, as amended, (hereinafter "the Act"), 42 U.S.C. § 5851, and its implementing regulations at 20 C.F.R.

Part 24. The Complainant filed a timely complaint with the U.S. Department of Labor pursuant to 29 C.F.R. 24.3. The Complainant alleges discrimination and harassment by reason of the fact that he had been discharged from his job as a pipefitter because he engaged in protected activity under the Act. Complainant seeks back pay damages from November 25, 1985 to present, punitive damages, damages for emotional distress, and attorneys' fees.

After his termination, Complainant filed a Quality Concern with Georgia Power Company (Tr. 121). Georgia Power concluded that his allegations of retaliation were without merit. In a memorandum dated December 6, 1985, Georgia Power stated, in pertinent part:

> It is the opinion of the investigator that nothing was provided or discovered during the investigation which substantiates the allegation of retaliation against the submitter by the Foreman or of provocation by the Foreman in this incident. It is further the opinion of the investigator that the disciplinary action was determined by the General Foreman and Superintendent, not the Foreman, and this action was proper and in accordance with company policy.
> No further action or investigation is determined to be required by Quality Concerns in regard to the retaliation or termination portions of this concern (RX 12; Tr. 133).

On January 31, 1986, Georgia Power Quality Concern Coordinator L. B. Glenn advised Mr. Henrey by letter of the conclusion of the investigation into the retaliation allegation. (RX-11; Tr. 131, 132). The letter stated, in pertinent part: "Our investigation failed to corroborate your claim that your termination was related to your having raised quality issues. We have found that your termination was based solely on the confrontation that took place on Monday morning November 25, 1985." (RX 11).

Subsequently, on December 19, 1985, Mr. Henrey filed a Complaint with the U.S. Department of Labor alleging that he had been terminated because of his refusal to follow instructions that he considered to be in direct conflict with quality control standards (RX-13; Tr. 186). Compliance Office Tonney L. Young investigated that Complaint and concluded that there was no evidence to substantiate the allegations and that "the primary reason for Henrey's discharge is the Monday poking/shouting incident itself." (RX-8; Tr. 36). Consequently, on January 16, 1986, Department of Labor Area Director Robert J. Bassett wrote to Mr. Henrey, stating, "We were unable to substantiate that your firing was discriminatory as you alleged, but rather that you were terminated for reasons of insubordination." (RX-7; Tr. 36). Shortly thereafter, Mr. Henrey requested a hearing.

A formal hearing was held in Augusta, Georgia on June 9, 1986 at which time the parties were afforded full opportunity to present documentary evidence and call witnesses. At the hearing, the undersigned expressly reserved ruling on the admittance of

Complainant's exhibits numbered 2-4, 6 and 9. Joint exhibit number 1, Complainant's exhibits numbered 1, 5, 7 and 8, and Respondent's exhibits numbered 1 through 16 were admitted without objection. At this time, it is hereby ordered that Complainant's exhibits 2-4, 6 and 9 are hereby admitted. The record was held open for 60 days following the hearing to allow the parties to submit briefs, proposed findings of fact and conclusions of law.

The findings of fact and conclusions of law which follow are prepared upon my observation of the witnesses who testified at the hearing and upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law.

Each exhibit entered, although perhaps not specifically mentioned in this decision, has been carefully reviewed and given thoughtful consideration.

Findings of Fact

Georgia Power Company and several electrical cooperatives are building the Alvin W. Vogtle Nuclear Project ("Plant Vogtle") near Waynesboro, Georgia. Pullman is the subcontractor to Georgia Power Company and is responsible for installing piping and pipe support systems at Plant Vogtle. Mr. Henrey was

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employed by Pullman as a pipefitter at Plant Vogtle from August 14, 1985 until his termination on November 25, 1985. (Stipulation of Facts 1). Mr. Henrey's employment with Pullman at Plant. Vogtle was his first job at a nuclear facility. (Stipulation of Facts 2).

While employed by Pullman, Mr. Henrey worked as a member 6f an instrumentation crew under the direct supervision of foreman Anthony Santose. (Stipulation of Facts 3). During the last week of his employment, Mr. Santose's immediate superior and Mr. Henrey's second-level supervisor was, General Foreman Eugene Pendrey. (Stipulation of Facts 4). At the time of his termination, Mr. Pendrey's immediate superior. and Mr. Henrey's third-level supervisor was Superintendent Robert Watson. (Stipulation of Facts 7).

All of the craftsmen, foremen and general foremen employed by Pullman at Plant Vogtle are represented by the Apprentices of the Plumbing and Pipe Fitting Industry (the "Union"). (Tr. 376, 377). Mr. Henrey, Mr. Santos, and Mr. Pendrey are all members of the Union. (Stipulation of Facts 5).

Mr. Henrey's union representative at Plant Vogtle was Union Steward Rudolph "Tut" James. (Stipulation of Facts 6). Mr. James' duties as Union Steward include orienting new employees, representing employees in connection with grievances or complaints, and solving disputes over craft jurisdiction. (Tr. 452, 457, 458). During Mr. Henrey's

orientation in August 1985, he received information and attended a lecture regarding Pullman's Quality Concern Program (Stipulation of Facts 9).

At the time of Mr. Henrey's termination, General Foreman Eugene Pendrey had been in Mr. Henrey's line of supervision for only one week, and Union Steward James' only contact with Mr. Henrey had occurred while guiding Mr. Henrey through orientation on his first day at the job site. (Stipulation of Facts 4; Tr. 375, 387, 449, 452, 453).

The Rules of Conduct and Safety applicable to all employees at Plant Vogtle prohibit "insubordination or other acts or threatening a supervisor, or other employer representatives." (RX-1, p.4). The penalty for violation of this rule is "termination for a period of not less than one (1) year." (RX-1, p. 5). Similarly, Pullman's own Rules and regulations provide

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that "insubordinate conduct or refusal to follow supervision's orders and/or instructions" are "prohibited and will result in termination." (RX-2, p. 6). During Mr. Henrey's employment with Pullman, he was aware that insubordination was a terminable offense at Plant Vogtle. (Stipulation of Fact 8). He was also aware that insubordination is grounds for discharge on any construction job (Tr. 204-205).

On Saturday, November 23, 1985, Mr. Santose gave Mr. Henrey instructions to measure and make markings on steel for the installation of a box as part of an instrumentation system. (Stipulation of Facts 10). This work was to be performed on Sunday, November 24, 1985, Mr. Santose's day off. There was an incident on a beam on Monday, November 25, 1985 (Stipulation of Facts 11).

Specifically, on Monday, November 25, 1985, Mr. Santose climbed the beam to inspect the work he had assigned to Mr. Henrey on Saturday, November 23, 1985. He noticed that the work had not been done and called Mr. Henrey over to explain himself. He also asked Mr. Henrey if anyone had told him not to make the marks on the box. Mr. Henrey testified that he informed Mr. Santose that the reason the work was not done was because Mr. Santose was not his boss on Sundays, and he was told to work in another area by the General Foreman, Eugene Pendrey. Mr. Henrey further stated that upon hearing this response, Mr. Santose replied that he was tired of the fact that Mr. Henrey did not obey his orders and he began shaking his finger in Mr. Henrey's face. Shortly thereafter, a heated argument ensued. Mr. Henrey admitted that he, and not "Mr. Santose, used curse words. However, Mr. Henrey was adamant that he did not curse specifically at Mr. Santose and he definitely did not call him a "mother fucker". The overwhelming evidence shows that Mr. Santose did not shake his finger in Mr. Henrey's face, rather Mr. Henrey poked Mr. Santose in the chest. The evidence also shows that Mr. Henrey did direct obscene language to Mr. Santose. First, Mr. Frank Hayes, a pipefitter who was standing approximately 25 feet away from this incident, testified that he saw Mr. Henrey pointing his finger at Mr. Santose's face or upper body and that Mr. Henrey looked more

aggressive in the argument (Tr. 476). Second, Mr. Samuel Lewis, a pipewelder who was 20 feet away from the incident, testified that he witnessed Mr. Henrey poking at Mr. Santose's chest (Tr. 485). Third, Mr. Walter LaReau testified that he saw Mr. Henrey use his forefinger

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to poke Mr. Santose's left shoulder. He further testified that it looked as though Mr. Henrey was trying to make a point (Tr. 498, Joint Exhibit 1). Fourth, Mr. Pendrey testified that Mr. Santose informed him that. Mr. Henrey poked him in the chest and directed obscene language towards him (Tr. 372-373). Finally, Mr. "Tut" James testified that Mr. Henrey himself told him that he did poke Mr. Santose and curse *at* him (emphasis added) (Tr. 454). Based on this collective evidence, I find that Mr. Henrey poked Mr. Santose in the chest and called him a "mother fucker".

Shortly after the poking/cursing incident, Mr. Santose approached Mr. Pendrey, explained what had occurred, and requested that Mr. Henrey be transferred out of his crew. Mr. Pendrey then went to the Instrumentation Superintendent, Robert Watson, and told him about the incident. Mr. Watson recommended that Mr. Henrey be fired because transferring him would be giving more problems to another foreman. Mr. Pendrey then went to the Union Steward, "Tut James" with this story to get his input. Subsequently, Mr. Pendrey and Mr. James met with Mr. Henrey and Mr. Santose (Stipulation of Facts 12). 1 Both men were given the opportunity to recount their stories. Mr. James indicated that Mr. Henrey's behavior could not be tolerated in the field. Mr. Henrey asked to be transferred, but Mr. James did not have the authority to do so. Mr. Santose then asked Mr. Henrey if he wanted to voluntarily quit[1] . Mr. Henrey preferred not to. Therefore, Mr. Santose prepared a termination slip for insubordination. Mr. Henrey informed Mr. Pendrey, Mr. James and Mr. Santose that if he was fired he was going to go to Quality Control, the Nuclear Regulatory Commission, and the Union. At the meeting, Mr. Pendrey terminated Mr. Henrey for insubordination (Stipulation of Fact 13).

Mr. Henrey testified that he told Mr. Pendrey and Mr. James at the meeting that the only reason Mr. Santose confronted him Monday morning, November 25, 1985 was because Mr. Santose was mad that he always put him on the spot for violating safety procedures (Tr. 121). However, the record evidence shows otherwise. First, Mr. Watson, the Instrumentation Superintendent, was not aware that Mr. Henrey had ever raised any safety concerns regarding Santose (Tr. 449). Second, Mr. Henrey's Union Representative "Tut" James, testified that Mr. Henrey did not say he was being terminated because he had complained about Mr. Santose violating safety procedures (Tr.

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456). Third, Mr. Pendrey testified that Mr. Henrey did not contend he was being fired because Mr. Santose told him to violate procedures (Tr. 388). Accordingly, I find that

Mr. Henrey did not file a complaint with the Nuclear Regulatory Commission, nor with Quality Control or his Union prior to his termination. Rather, he took this action subsequent to his termination, in retaliation for being fired.

The Georgia Power Quality Concern claim was dismissed due to the fact that they could not substantiate Mr. Henrey's complaints. The U.S. Department of Labor could find no evidence to substantiate Mr. Henrey's complaints either. Consequently, Mr. Henrey requested a formal hearing.

At the formal hearing of this matter, Mr. Henrey alleged that Mr. Santose ordered him to violate four safety procedures. The first alleged violation occurred when Mr. Santose allegedly instructed his crew to work without the Red Book of drawings in their possession. Mr. Gary Parker, a welding inspector for Pullman Power Products, testified that Mr. Henrey confidentially informed him that the required documentation was not present in the work area. Mr. Parker did not mention to anyone that Mr. Henrey had made a complaint until sometime after his termination. Based on his inspections, Mr. Parker concluded that Mr. Santose should be dismissed as a foreman because of the number of rejected inspections. Mr. Parker explained that the quality of the work of Mr. Santose's crew was not rejectable; rather it was the missing documents (Tr. 287-288). Consequently, Mr. Charles Cone, Jr., Pullman's Assistant Quality Control Supervisor, investigated Mr. Parker's complaints. Mr. Cone determined that Mr. Parker's complaint that the drawings were not in the work area at all times was not a terminable offense (TR. 526-527). Mr. Cone explained that the drawings should be in the work area while they are working, but that it is *not required*, unless there is an inspection (Tr. 524). Mr. Cone testified that he explained to Mr. Santose that he should make an effort to have the drawings at the work sites when Quality Control makes, their inspections, because it facilitates their jobs (Tr. 529). He further testified that he did not hear that Mr. Santose continued the trend of missing drawings. Mr. Parker testified that the fact that the drawings were not there when Quality Control was conducting their inspections, did not mean that they were not present when the work was being performed (Tr. 309). Mr. Parker did not regard any of the missing documents violations to be

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detrimental to the safe operation of the construction of the plant (Tr. 312). Additionally, five of Mr. Henrey's co-workers, (Jr. Richard Dailey, Howard Barksdale, Samuel Lewis, Randall Knowles, and Frank Hayes), testified that Mr. Santose never directed anyone to violate any procedure (Tr. 468, 484, 487). Based on the totality of the evidence, I find Mr. Santose did not violate any safety procedure by failing to have the drawings available during the inspections. I further find that Mr. Santose corrected his trend of missing drawings. Additionally, I find that Mr. Santose did not retaliate against Mr. Henrey for complaining to Mr. Parker, because he had no idea of these "confidential" complaints prior to the termination.

The second alleged violation occurred when Mr. Santose allegedly instructed "Mr. Henrey and his welder to inscribe another welder's number on a weld. The general procedure that is followed is that the welder who works on a weld must inscribe his number on that weld. However, welder Y may inscribe welder X's number on a weld if he has the proper documentation to verify that welder X actually performed the work, and if he has the authority to take such action (Tr. 396-399). Additionally, if two welders work on a particular weld, then they both must inscribe their numbers on it (Tr. 403). In this case, Mr. Henrey's assertion that Mr. Santose ordered him to violate procedures by inscribing another welder's number on a weld is not proved by a preponderance of the evidence. Indeed, while the record indicates that Mr. Santose ordered Mr. Henrey to inscribe another welder's number, there is no proof that Mr. Santose did not have the proper documentation to verify which welder actually performed the work. Nor is there any proof that Mr. Santose did not have the authority for such action. Accordingly, I find no procedures were asked to be violated in this instance.

The third alleged violation is the so-called "pre-heating[2] incident". Approximately a week before Mr. Henrey's termination, Mr. Santose's crew were preparing to tack steel. Mr. Henrey, as well as other members of his crew, indicated that they believed the tack weld had to be pre-heated. Mr. Santose told his crew that the tack weld did not have to be pre-heated as per the instructions of Quality Control inspector, Richard Kinsey. After the crew completed a section, Quality Control inspector, Guy Stanley, informed Mr. Santose and Mr. Pendrey that the tack weld did have to be pre-heated. The crew had to re-work the section

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and pre-heat the tack weld. The evidence in this case shows that Mr. Santose's order not to pre-heat was not a violation of safety procedures. He was specifically instructed by a Quality Control inspector not to pre-heat. Testimony furnished by Gary Parker indicates that Quality Control inspectors can disagree as to what is the proper procedure, and because there is alot of room for different interpretations, a higher level Quality Control inspector must intervene and make the final decision (Tr. 308). Mr. Charles Bowles, Pullman's Assistant Instrument Engineering Supervisor, testified that the process. sheets which he prepared for this project did not require pre-heating because he did not feel tack welds needed to be pre-heated (tr. 507). Mr. Bowles further testified that subsequently, after he and the field engineer researched this, he realized that he was incorrect and concluded that tack welds require pre-heating (Tr. 508). Nevertheless, the process sheets did not indicate his change in position. The process sheets are required to be physically present on the job sites. The purpose of the process sheets is to instruct the crafts (e.g. welders and pipefitters) on the documentation and sequence of events for installation. The process sheet for this project did not indicate one way or another whether welds had to be pre-heated (Stipulation of Facts, Tr. 519). Nevertheless, notwithstanding this stipulation and Mr. Bowles' testimony, Mr. Henrey assets that the process sheets specifically required pre-heating (Tr. 87). The technique sheets for this project indicated that welds greater than 1 1/2 inches needed to be pre-heated, but was silent concerning

whether tack welds had to be pre-heated (Stipulation of Facts, Tr. 520). The totality of the record evidence shows and I find that the order not to pre-heat was not a violation. After he found out that pre-heating was required, Mr. Santose ordered his crew to pre-heat.

The fourth and final alleged violation occurred when Mr. Santose allegedly ordered Mr. Henrey to install temporary materials permanently, and to hide or destroy the permanent materials he had requisitioned. Larry Masengale, Mr. Henrey's welder, and a pipefitter, agreed that Mr. Santose had ordered them to install the temporary materials improperly. However, as aforementioned, many of Mr. Henrey's co-workers, Jr. Dailey, Howard Barksdale, Samuel Lewis, Randall Knowles, Walter LaReau and Frank Hayes, testified that Mr. Santose never ordered anyone to violate procedures. Additionally, Mr. Santose testified that he never directed anyone to leave up temporary installations and

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tell Quality Control that they are permanent (Tr. 426). Further, Mr. Santose explained that generally the team who puts up the temporary material is not the same team who puts up the permanent material. He also testified that because Mr. Massengale was not certified in weld tubing, he preferred not to work him on permanent installations (Tr. 427). Mr. Parker, Pullman's welding quality inspector, testified that temporary material may become a part of the permanent installation if it meets certain criteria (Tr. 281-282). Mr. Henrey testified at the hearing and in his deposition that he never complained to anyone about the alleged violation of leaving temporary material up as permanent prior to his termination because he did not consider it life threatening (Tr. 200). Clearly, the evidence fails to show that any safety violation occurred. Accordingly, I find that Mr. Henrey's temporary versus permanent allegation is without merit.

Mr. Masengale's assertion that he was transferred to another area subsequent to Mr. Henrey's termination as a means of punishment is not supported by the evidence. Joseph Brown, the General Foreman for pipefitters instrumentation, testified that Mr. Masengale was transferred because of his seniority, not because of his qualifications. Mr. Brown explained that after the workload decreased, the company had to transfer instrumentation technicians to pipefitting (Tr. 491-494). Accordingly, I find that Mr. Masengale was not transferred for punishment reasons, rather for a legitimate company reason. Testimony furnished by Randall Knowles indicates that Mr. Henrey had a personal grudge against Mr. Santose (Tr. 488-490). Mr. Santose had instructed both Mr. Knowles and Mr. Henrey how to drill certain holes. Mr. Knowles misunderstood the directions. Mr. Henrey did not pay attention while the directions were given because he thought he knew the procedure. The holes were drilled incorrectly. As a result of this, Mr. Santose reprimanded Mr. Henrey and Mr. Knowles in front of the crew. Additionally, Superintendent Dan Hayes removed their overtime privileges upon hearing that Mr. Henrey felt there were no problems because they would fix it on double overtime. Mr. Knowles testified that Mr. Henrey was going to make Mr. Santose show him each and every step of every procedure because he had reprimanded him in Public.

Conclusions of Law

The main issue to be determined is whether Mr. Henrey was terminated in retaliation for complaints he made about alleged instructions to violate procedures. The Complainant asserts that

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he was terminated for engaging in protected activity under the Act. The Respondent denies this assertion, and alleges that the sole reason Complainant was terminated was because of his insubordination towards his foreman.

The statute which gives rise to this proceeding protects employees from discriminatory action directed toward them as a result of certain endeavors to pursue its enforcement. Section 5851(a) of 42 U.S.C. provides, in pertinent part, as follows:

> (a) No employer, including a . . . contractor or a subcontractor of a [Nuclear Regulatory] Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . .
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
> (2) testified or is about to testify in any such proceeding or;
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

The implementing regulations state that:

> any person is deemed to have violated the particular federal law and these regulations if such person intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee . . . who has engaged in any activity set forth in the statute. 29 C.F.R. § 24.2(b).

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In other words, the statute and its implementing regulations prevent employers from retaliating against employees who have "blown the whistle" on them for violating the federal statute.

Clearly, this case falls under the dual motive discharge cases which arise under employee protection provisions found in a wide variety of statutes (See, e. g. Title VII of the Civil Rights Act of 1964, as amended, Section 704(a), 42 U.S.C.2000e-3(a); the Fair Labor Standards Act of 1938 as amended, Section 15(a)(3), 29 U.S.C. 215(a)(3); National Labor Relations Act, Section 8(a)(4), 29 U.S.C. 158(a)(4)). As aforementioned, Complainant asserts he was fired for engaging in protected activity, while Respondent claims that Mr. Henrey's termination was justified because he was insubordinate toward his foreman, Mr. Santose.

The Second Circuit in *Consolidated Edison Company of New York, Inc. v. Donovan*, 673 F.2d 61 (2nd Cir. 1982) set forth the general principles which apply in these cases:

> In *Wright Line, a Division of Wright Line, Inc.*, 25.L NLRB 1083 (198), *aff'd sub nom. NLRB v. Wright Line*, 662 F.2d 899 (2st Cir. 1981), the NLRB adopted a new test in dual motive discharge cases for determining whether Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1973), has been violated. Under this test,
> [Tlhe General Counsel [must] make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. (251 NLRB at 1089)
> This rule was adopted from *Mt. Healthy City School District Board of Education v. Doyle*,

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> 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977), where the Court said that the burden was properly placed upon the employee to show that his conduct was constitutionally protected, and that such conduct was a motivating factor in the Board's decision not to rehire him. Thereafter, the district court "should have gone on to determine whether the Board [of Education] had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's [employee's] reemployment even in the absence of the protected, conduct." This is known as the "but for" test. In other words, the employee would not have been dismissed but for his engaging in protected activity. There is no precedent as to how cases under Section 5851 should be treated, but the legislative history of the section makes clear that recourse may be had to precedent under analogous situations. S.Rep.No.. 95-848, 95th Cong., 2d Sess. at 29, 1978 U.S. Code Congressional and Administrative News at 7303. The test adopted by the NLRB appropriately should be applied in Section 5851 proceedings.
> Our view is that we should adopt the rule enunciated in the *Mt. Healthy* case which places the burden on the employer to show by a preponderance of the evidence that it would have reached the same decision as to the employee's dismissal even in the absence of the protected conduct.

The Supreme Court reaffirmed the *Wright Line* approach to the question of burdens of proof in retaliatory discharge cases in *NLRB v. Transportation Management Corp.*, 51 U.S.L.W. 4761 (Jan. 15, 1983).

In *Dartey v. Zack Co. of Chicago*, 82-ERA-2 (April 25, 1983), the Secretary of Labor stated the rule as follows:

> the employee must prove by a *preponderance of the evidence* that the protected conduct was a

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> motivating factor in the employer's action for the burden of proof or persuasion to shift to the employer to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct.

In this case, the evidence shows that Complainant did not engage in protected activity under the Act. I find Mr. Henrey was not a whistleblower. He admitted that he did not complain to anyone outside of Pullman personnel about the procedural violations until sometime after his termination. As I found earlier, the violations that he did allege were not substantial. In fact, I found that no safety procedures were violated. I conclude that Complainant did not engage in any protected activity, and that the sole reason he raised the allegations of procedural violations was to retaliate against Pullman for terminating him.

Even assuming *arguendo* that Complainant did engage in protected activity, his next step is to prove by a preponderance of the evidence that the protected activity was a motivating factor in the employer's decision to discharge. In this case, Complainant failed to prove this burden. The majority of the evidence shows that the Respondent had no idea he had engaged in protected activity. Neither the Complainant's General Foreman, Superintendent nor Union Steward knew he had any complaints of violations prior to his termination. Moreover, even if the Complainant did prove he was discharged because of his protected activity, the burden shifts to Respondent to show the existence of a legitimate reason for discharge. In this case, Respondent states that the reason it terminated Mr. Henrey was because he used foul language and raised his hand to a superiors, which conduct cannot be condoned if respect for superiors is to be maintained. Clearly, Respondent has shown by a preponderance of the evidence that it would have reached the same decision to discharge even in the absence of the protected activity. Additionally, Complainant has failed to prove that "but for" his engaging in protected activity, he would not have been dismissed. Accordingly, I find that Mr. Henrey's complaint must be dismissed. Consequently, his prayer for back pay, punitive damages and attorney's fees must be denied.

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ORDER

It is hereby ORDERED that Charles A. Henrey's complaint is DISMISSED.

PARLEN L. MCKENNA
Administrative Law Judge

Dated: [Jan. 29, 1987]
Metairie, Louisiana

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[ENDNOTES]

[1] If an employee quits voluntarily he could be rehired in 30 days. On the other hand, if he is fired, there is a 6 month penalty (Tr. 382).

[2] Pre-heating is the process of heating steel to a certain temperature before welding in order to ensure a strong weld (Tr. 76). Pre-heating is generally required before welding material to steel greater than 1 1/2 inches thick.